

1  
2  
3  
4  
5  
6  
7  
8 UNITED STATES DISTRICT COURT  
9 WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

10 GARY CASTERLOW-BEY,  
11 Plaintiff,

12 v.

13 CITY OF TACOMA and CITY OF  
14 LAKEWOOD,  
15 Defendants.

CASE NO. 3:17-cv-05676-BHS-

DWC

REPORT AND  
RECOMMENDATION

Noting Date: December 1, 2017

16 The District Court referred this action, filed pursuant to 42 U.S.C. § 1983, to United  
17 States Magistrate Judge David W. Christel. Before the Court is Plaintiff's Motion for Voluntary  
18 Dismissal. Dkt. 8. After review of the Motion, the undersigned recommends Plaintiff's action be  
19 dismissed pursuant to Rule 41(a) of the Federal Rule of Civil Procedure.

20 **BACKGROUND**

21 Plaintiff originally filed this action in August of 2017. Dkt. 1. After granting Plaintiff's  
22 Application to Proceed *In Forma Pauperis* (Dkt. 5), the Court filed an Order to Show Cause or  
23 Amend outlining several deficiencies in Plaintiff's Complaint (Dkt. 7). In response, Plaintiff  
24

1 filed this Motion for Voluntary Dismissal, explaining he will not have enough time to effectively  
2 prosecute this case due to a pending criminal trial and wants to avoid a strike pursuant to 28  
3 U.S.C. § 1915(g). Dkt. 8.

#### 4 **DISCUSSION**

5 Plaintiff requests his claims be dismissed without prejudice. Federal Rule of Civil  
6 Procedure 41 sets forth the circumstances under which an action may be dismissed. Under Rule  
7 41(a)(1), an action may be voluntarily dismissed without prejudice by the plaintiff if the plaintiff  
8 files a notice of dismissal before the defendant files an answer or summary judgment motion and  
9 the plaintiff has not previously dismissed an action “based on or including the same claim.”  
10 Fed.R.Civ.P. 41(a)(1); *Wilson v. City of San Jose*, 111 F.3d 688, 692 (9th Cir. 1997).

11 Plaintiff requested dismissal before the Court ordered his Complaint served, and so has  
12 requested dismissal before either Defendant filed an answer or motion for summary judgment.  
13 *See* Dkt. 8. Further, Plaintiff has not previously dismissed an action based on the same claim.  
14 Because of this, Plaintiff’s request falls within the provisions of 41(a)(1). Therefore, the Court  
15 finds dismissal without prejudice is appropriate in this case.

#### 16 **CONCLUSION**

17 For the foregoing reasons, the Court recommends Plaintiff’s Motion (Dkt. 8) be granted  
18 and his action dismissed without prejudice.

19 Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have  
20 fourteen (14) days from service of this Report to file written objections. *See also* Fed. R. Civ. P.  
21 6. Failure to file objections will result in a waiver of those objections for purposes of *de novo*  
22 review by the district judge. *See* 28 U.S.C. § 636(b)(1)(C). Accommodating the time limit  
23  
24

1 imposed by Fed. R. Civ. P. 72(b), the clerk is directed to set the matter for consideration on  
2 December 1, 2017, as noted in the caption.

3  
4 Dated this 17th day of November, 2017.

5   
6

7 David W. Christel  
8 United States Magistrate Judge  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24